

5 Official Opinions of the Compliance Board 136 (2007)

OPEN SESSION REQUIREMENT – CLOSED SESSION PROCEDURES – PATTERN AND PRACTICE OF VIOLATIONS FOUND

April 16, 2007

Ms. Beth Ward
Worcester County Times

The Open Meetings Compliance Board has considered your complaint that the Mayor and Council of the Town of Berlin (hereafter “Council”) has routinely engaged in meeting practices that violate the Open Meetings Act. The complaint cited five meetings in particular as evidencing this pattern of violations.¹ In its timely response, submitted on behalf by Town Attorney David C. Gaskill, the Council conceded that the requirements of the Act “have, historically, never been adhered to.” The Council also identified certain steps that it has taken to promote future compliance.

Under the circumstances, lengthy analysis is unnecessary. If a public body decides to close a meeting that is subject to the Open Meetings Act, it must follow the procedures set out in §10-508(d).² The complaint alleged, and the Council conceded, that it had not done so. The Compliance Board finds this to have been a violation. The Council avowed that it will adhere to these procedural requirements in the future, with reliance on a form developed by the Attorney General’s Office to assist public bodies with compliance. *See* Office of the Attorney General, *Open Meetings Act Manual* (6th ed. 2006), Appendix C. Consistent, good-faith use of this form should ensure future procedural compliance.

¹ The specific meetings identified in the complaint were held on November 13, November 27, December 11, and December 27, 2006, and January 8, 2007. The Compliance Board also received a letter dated March 14, 2007, from Alice Neff Lucan, Esquire, representing the Maryland-Delaware-D.C. Press Association. In this letter, Ms. Lucan expressed her view that the Council’s response confirmed certain improper discussions in closed session. The Compliance Board did not deem this letter as itself constituting a separate complaint or warranting a response from the Council.

² All statutory references are to the State Government Article, Annotated Code of Maryland.

The Act also requires that, after a closed meeting, certain information about it be made public in the minutes of the next open meeting. §10-509(c)(2). The complaint alleged, and the Council conceded, that this requirement had not been met. The Compliance Board finds this to have been a violation. According to the Council, the Town's administrative staff "has been advised of the requirements of, and necessity for, compliance with §10-509(c)(2)." Moreover, the Council has now prepared and disclosed the required information about the meetings identified in the complaint and one additional meeting, on February 12, 2007. Routine and timely disclosure in this manner will keep the Council in compliance with this aspect of the Act's procedural requirements.

Central to the Act's policy bias towards openness is the prohibition on discussing anything at a closed meeting except to the extent permitted by one or more of the Act's exceptions. §10-508(b). The complaint alleged that the Council "is discussing topics and taking action in these closed meetings that should be done in an open public meeting." In its response, the Town acknowledged several instances in which the topic of discussion was impermissible in a closed session. These included matters related to annexation, an audit report, sewer capacity, and the Town's water and sewer plan. The Compliance Board finds this practice to have been a violation.

The Council's response was limited, however, to the particular meetings identified in the complaint. That is, the response did not directly engage the complaint's inference that, not only at these meetings but at many others, the Council discussed topics in a closed session for which no exception had been, or could be, invoked.

Obviously, we cannot know what was discussed in closed meetings that were not mentioned in the Council's response. Given the Council's past disregard for the requirements of the Open Meetings Act, however, we infer that this improper practice occurred more often than at these particular meetings. Consequently, it is all the more important that the Council be scrupulous in limiting discussion at future closed meetings to the topics encompassed by the exception cited as the basis for the closed session, and no other. The Town Attorney will have to play a key role in ensuring compliance in this regard.

In applying the exceptions, the Council and the Town Attorney must remain cognizant of their scope, especially in light of the Act's interpretive mandate that the exceptions allowing for a closed session "shall be strictly construed in favor of open meetings of public bodies." §10-508(c). For example, in its response concerning the meeting of December 27, 2006, the Council noted discussion of "a request by the Berlin Volunteer Fire Company that its ambulance personnel become Town employees." The response contended that this topic "was exempt under §10-508(a)(1)," the exception for personnel matters. Closed-session discussion under

this exception, however, is permitted only when the employment circumstances of specific, identifiable individuals are being discussed. Whether the ambulance service now being provided by volunteers should become a municipal service instead is surely a policy matter that is *not* within the personnel exception. *See, e.g., 3 OMCB Opinions 67 (2000)*. Similarly, if the discussion at the January 8, 2007, meeting concerning “employee compensation and the Town’s personnel policy” went beyond the circumstances of specific individuals, this discussion too was beyond the scope of the personnel exception.

Also at the January 8 meeting, a topic of discussion was “proposing draft legislation concerning the Berlin Utility Commission.” According to the response, this discussion as exempt under §10-508(a)(7), which applies to consultation with a public body’s counsel “to obtain legal advice.” Although the rendering of legal advice about the drafting of legislation is commonplace and permitted in closed session under this exception, if the discussion involved any policy questions about the draft legislation, that aspect of discussion was beyond the exception and could only permissibly occur in open session.

In summary, the Open Meetings Compliance Board finds a pattern and practice of violations by the Mayor and Council of Berlin. The Compliance Board commends the Council’s frank recognition of its prior unlawful behavior and its adoption of steps to ensure future compliance. It is up to the Council to make this commitment a reality.

OPEN MEETINGS COMPLIANCE BOARD

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